

In the Matter of Petition for Declaratory Ruling
to the Iowa Utilities Board and
Contingent Petition for Preemption

RPP/350867.1

American's review of the IUB Final Order, it is now even clearer that the Commission needs to provide a comprehensive resolution to the issues raised in the Great Lakes/Superior Petition. All American therefore files these reply comments in further support of the Great Lakes/Superior Petition and urges this Commission to grant the same.

The Great Lakes/Superior Petition was styled as a Petition for Declaratory Ruling and Contingent Petition for Preemption. As explained above, now that the IUB filed its Final Order which, in large part, mirrors the language from the August 14, 2009 Decision Meeting referenced in the Great Lakes/Superior Petition, the Commission should transform Great Lakes/Superior's contingent Petition for Preemption into a Petition for Preemption. Preemption, as soon as practicable, is necessary since the IUB's Final Order encroaches into areas clearly outside of its jurisdiction.

Moreover, in addition to preempting the IUB's rulings, the need for an expansive and comprehensive Declaratory Ruling, as previously sought by All American, remains essential. All American urges this Commission to issue a wide-ranging Declaratory Ruling designed to quiet, once and for all, the issues related to the obligations of interexchange carriers ("IXCs") to compensate rural LECs for the termination of customer calls to conferencing services and chat-line providers. With more than 17 cases pending in different jurisdictions across the nation, regarding similar, if not identical issues, clear and unequivocal direction from the Commission is not only desired, it is imperative. All American urges the Commission to act accordingly.

I. THE COMMISSION MUST USE THIS OPPORTUNITY TO QUIET IDENTICAL ISSUES RAISED ACROSS THE UNITED STATES.

As described in detail in All American's initial comments, All American is currently involved in a collection action against AT&T filed in the Southern District of New York.³ The claims and defenses raised in the *Collection Action* are virtually identical to those raised in the Qwest Complaint and

³ *All American Tel. Co., Inc. v. AT&T Corp.*, 07 Civ. 861 (S.D.N.Y) ("*Collection Action*").

addressed in the IUB Final Order. Moreover, there are currently 17 federal court cases pending in various jurisdictions across the nation which raise issues similar or identical to those that are the subject of the Great Lakes/Superior Petition and addressed by the IUB Final Order. All American's own *Collection Action* has been referred, in part, to the Commission already. Further, one other federal court has referred a collection action,⁴ virtually identical to All American's *Collection Action*, to the Commission in its entirety. What that means is that there are now at least three matters pending before the Commission, all relating to identical issues.

With so many substantially similar issues pending across the nation in both federal courts and in state commissions similar to the IUB, it is without question that there is a pressing need for this Commission to provide guidance on the issues raised in these cases. Accordingly, All American urges this Commission to quiet the issue by reiterating the current state of the law as articulated in prior Commission decisions, which are not only relevant to this issues raised in each of these cases, but of broader precedential value—despite the IUB's assertions to the contrary. A comprehensive declaratory ruling, as requested by Great Lakes and Superior and supported by All American, is the only way to provide such complete resolution to these pending issues.

II. THE IUB FINAL ORDER ADOPTS POSITIONS CLEARLY CONTRARY TO THE COMMISSION'S PRIOR DECISIONS

The IUB Final Order provides a compelling case for the preemption requested in the Great Lakes/Superior Petition, confirming that the Commission must clarify the substantive disputes at issue through a Declaratory Ruling. As the IUB held in its August 14, 2009 Decision Meeting, the IUB Final Order demonstrates that the IUB has clearly exceeded its authority by issuing a decision that directly addresses the regulations of interstate access charges. This

⁴ *Tekstar Commc'ns., Inc. v. Sprint Commc'ns. Co., L.P.*, No. 08-cv-1130 (D. Minn.).

overstepping is dramatically evidenced through reviewing the findings of fact reached in the IUB Final Order.

For example, the IUB held:

- “FCSCs are not end users as defined by the Respondents’ tariffs.” Final Order at 78 ¶ 2.
- “The intrastate toll traffic did not terminate at the end user’s premises.” Final Order at 78 ¶ 10.
- “The Respondents and FCSCs acted as business partners.” Final Order at 78 ¶ 6.
- “The filed tariff doctrine does not apply to the Respondents in this case.” Final Order at 78 ¶ 7.
- “The sharing of revenues between Respondents and FCSCs is not inherently unreasonable, but may be an indication that a particular service arrangement is unreasonable.” Final Order at 78 ¶ 8.
- “The FCSCs did not subscribe to the Respondents’ intrastate switched access or local exchange tariffs.” Final Order at 77 ¶1. *See also* Final Order at 24 (noting “The Board finds that the lack of timely, legitimate billing for tariffed services by the Respondents demonstrates that the FCSCs did not actually subscribe to a billable tariffed service.”).

As demonstrated above, it is clear that the IUB Final Order directly contravenes conclusions reached by the Commission in prior adjudicatory rulings interpreting tariff language similar or identical to those that were at issue in the Qwest Complaint.

Furthermore, the IUB Final Order belittles the relevance of prior Commission adjudicatory decisions. The IUB seeks to denigrate the reliance Great Lakes, Superior, and others place on the holding in *AT&T v. Jefferson*,⁵ claiming that reliance on this case is misplaced because “the FCC emphasized the narrowness of its holding” in *Jefferson*. However, the Commission itself, in two other adjudicatory proceedings decided after *Jefferson*, positively

⁵ *AT&T Corp. v. Jefferson Tel. Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001) (“*Jefferson*”).

cited to *Jefferson* when the IXC's arguments were identical to those raised in *Jefferson*.⁶ Thus, despite the IUB's attempt to distance itself from the ruling, the Commission has demonstrated that *Jefferson* and its progeny have precedential effect. These rulings are similarly relevant in both the Great Lakes/Superior Petition and All American's own referral to the Commission in the *Collection Action*.

The IUB also seeks to sidestep the most recent Commission decision directly addressing these issues.⁷ The Commission in *Farmers and Merchants* rejected the same arguments IXCs made in the Qwest Complaint, finding that Farmers had not violated federal law or its federal tariff through assessing access charges for the termination of calls to conference calling companies. The Commission further found that conference calling companies were "end users" under the terms of Farmers' federal tariff, and that payment of marketing fees to the conference calling companies did not alter their status as end users under Farmers' tariff, regardless of which party (the LEC or the conference calling company) received the greatest financial benefit from the transaction.⁸

The IUB Final Order dismisses *Farmers and Merchants* claiming that the conclusions of the Commission should be disregarded because the Commission granted Qwest's petition for rehearing related to a factual issue in the case. IUB Final Order at 28-29. Moreover, the IUB seeks to circumvent the precedent established by the Commission in *Farmers and Merchants* by

⁶ See *AT&T Corp. v. Frontier Commc'ns. of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 4041 (2002) (finding that "[t]he issues raised in this Complaint are identical to those raised and denied in *AT&T v. Jefferson*. Thus, for the reasons explained therein, we conclude that AT&T has failed to meet its burden of demonstrating that Defendants violated either section 202(a) or section 201(b) of the Act."); *AT&T Corp. v. Beehive Tel. Co., Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 11641 (2002) (noting "AT&T's allegations and arguments are identical to those raised and denied in *AT&T v. Jefferson* and *AT&T v. Frontier*. Thus, for the reasons explained in those orders, we conclude that AT&T has failed on this record to meet its burden of demonstrating that Beehive violated either section 201(b) or section 202(a) of the Act.")

⁷ *Qwest Commc'ns. Corp. v. Farmers and Merchants, Mut. Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007) ("*Farmers and Merchants*").

⁸ See *Farmers and Merchants*, 22 FCC Rcd at 17985-88, ¶¶ 30, 35, 38-39.

claiming that it was in a better position to rule on these issues because it had a “complete record in this case.” *Id.* at 57. The Commission’s Rules make clear that the pendency of a petition for reconsideration does not stay the effect of a commission order, and thus, the *Farmers and Merchants* ruling is binding law.⁹ Despite the rehearing currently pending by the Commission as to factual issues in the *Farmers* case, it is unquestionable that the legal conclusions made by the Commission in *Farmers and Merchants* remain valid and, to the extent that the factual basis relied upon by the Commission matches actuality in the Qwest Complaint and the *Collection Action*, it is certain that those findings of fact remain relevant to All American, Great Lakes and Superior.

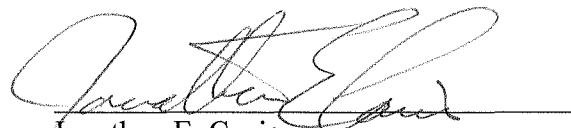
The IUB’s dismissal of *Farmers and Merchants*’ value, as well as its willingness to explain away the relevance and applicability of other Commission precedent, are further examples of how the IUB’s Final Order must be preempted by this Commission. As demonstrated above, all of the IUB rulings are either directly contradicted by Commission precedent and policy or are widely *ultra vires*. For these reasons, All American urges the Commission to preempt the holdings of the IUB Final Order and, once and for all, quiet the issues raised therein, by issuing a comprehensive Declaratory Ruling that affirms the current state of the law.

⁹ See 47 C.F.R. § 1.429(k) (noting “[w]ithout special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with any rule or operate in any manner to stay or postpone its enforcement”)

III. CONCLUSION

For the reasons discussed above, All American Telephone Company, Inc. supports the Great Lakes and Superior Petition for Declaratory Ruling and Preemption.

Respectfully submitted,



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Dated: October 6, 2009

CERTIFICATE OF SERVICE

I, Michele Depasse, do hereby certify that the foregoing **REPLY COMMENTS OF ALL AMERICAN TELEPHONE COMPANY, INC. SUPPORTING THE PETITION FOR DECLARATORY RULING FILED BY GREAT LAKES COMMUNICATIONS CORPORATION AND SUPERIOR TELEPHONE COOPERATIVE** was sent via email on this 6th day of October 2009 to the following:

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